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Supreme Court, U.S.
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No. 02-88

IN THE

Supreme Court of the United States

AUDIO ODYSSEY, LTD., DOGAN A. DINCER, and ANN M. DINCER,

Petitioners,

v.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation, MICHAEL M. BLADEL, Sheriff of Scott County, Iowa, JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa, CHARLES A. BARTON, Deputy Sheriff of Scott County, Iowa, JOHN C. BRADLEY, CHRIS A. PIEPER, MERCHANTS BONDING COMPANY (Mutual), BERNARD J. HOFMANN, and ANDERSON & NELSON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement regarding Petitioner, Audio Odyssey, Ltd., was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

I. Misstatement Of Material Facts In Brief In Opposition Relevant To Questions Before The Court.

The state court replevin action was never settled as alleged in Respondents' Brief In Opposition ("Brief") on page 5. On August 10, 1999, the state court refused to allow the Bank another continuance. (Iowa District Court Ruling on Motion, L-55.) With a jury trial looming in state court, the Bank dismissed its own petition in replevin pursuant to Iowa Rule of Civil Procedure 215, which is **self-executing**. Only through the insistence of replevin defendants did the court address the matter. (Iowa District Court Order, L-56.) Iowa Rule of Civil Procedure 215[1] stated in relevant part:

> A party may, without order of court, dismiss that party's own petition, counterclaim, cross-claim, cross-petition, or petition of intervention, at any time up until ten days before the trial is scheduled to begin. . . .

(Iowa Rules of Court State and Federal 1999.) Audio Odyssey's personal property was never returned nor were Petitioners ever compensated.

Not knowing the eventual outcome of the replevin suit in 1997, Petitioners filed their federal complaints. This was more than two years before the Bank dismissed its state court petition which occurred more than four years after the seizure.

"Original Notice" (Iowa's "Summons") was served on Mr. Dincer at his home on August 9, 1995, three weeks after the replevin, and return of service was filed with the clerk on August 10, 1995. Respondents' state in (page 6) of their Brief, "[t]he issue of documents that were served is in dispute. Discrepancies exist as to the method and nature of documents served," implies that original notice was served as required by the Iowa Rules of Civil Procedure. It was not. Respondents contradict their own implication on page 21 of their Brief which states:

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1. Iowa Rules of Civil Procedure have been since renumbered. Petitioners' citations are made to the Rules as they were in effect when the actions occurred.

> Similarly, in this case, on August 4, 1995, three weeks after the filing of the replevin petition and prior to the Bank's service of an original notice, petitioner filed a motion to dismiss, claiming it had not been served with original notice.

The Bank's Petition in Replevin stated:

> 13. Iowa Code Section 643.5 provides the court with the discretion to waive notice and hearing. . . .
>
> WHEREFORE, plaintiff prays the court waive notice and hearing. . . .

Although Respondents claim "[t]he following week, all of the property on the premises, furniture, equipment and machinery, were inventoried, removed and turned over to the Bank in the care of John C. Bradley," the deputy sheriff, while placing and maintaining large red "NO TRESPASSING" signs on the doors with the sheriff's name on them, turned over all personal property and the business premises to the banker on July 14, 1995 before returning to conduct an inventory later the next week. The Bank had retained the locksmith, had the keys and had unfettered access to the premises.

In a hearing begun on August 22, 1995, but never concluded, due to the Bank's attorneys' conflict of interest and requests for continuance, John Bradley when asked when he got the keys, testified:

> A. "We had the keys once the locks were changed."

On March 15, 1999, the Scott County defendants filed a Statement Of Material Facts As To Which There Is No Genuine Issue. Paragraph 7 states:

> . . . Deputy Norris served the Writ of Replevin[2], ordered the customers and employees to leave, obtained keys to the premises and gave them to John C. Bradley.

(Footnote added.)

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2. Another discrepancy here since the County Respondents later claim that the "order" was also served, p. 4, Brief. It wasn't.

In an affidavit given on December 7, 1999, Doug Retherford, News Director at KWQC Channel 6, stated:

> On August 16, 1995, KWQC broadcast news regarding the closing of Audio Odyssey. The news footage included movers loading up a truck with equipment as well as a close-up of the "No Trespassing by Order of the Sheriff Department" sign placed on the front door of Audio Odyssey.

Respondents state, p. 5, Brief:

> Although the practical effect may be the same, it was never the intent of any party to knowingly seize the real estate.

When deposed in 1999, Charles Barton testified:

> A. On July 14, 1995, I glanced at the writ of replevin and assumed the real estate was part of the taking.

At the time of the occurrence, he told the Bank's attorney that the Bank needed moving vans, initially recognizing that a replevin was for personal property (the property would have to be carried out and inventoried and put into moving vans). The response from the Bank's officer through its attorney was: "Can't you lock them out?" Sgt. Barton then agreed. Isn't the intent to (indefinitely) lock out the Petitioners (change the locks) the intent to seize the real estate?

The last paragraph on page 6 states:

> Audio Odyssey was in default on its loan. The Bank was concerned that collateral for the loan was at risk. The Bank had received notice that the insurance policy on the collateral had been canceled.

The following facts have never been controverted. On July 13, 1995, the day before the filing of the Petition in Replevin and the execution of the writ, Mr. Dincer, paid his June and July monthly payments on the loan. He instructed one of the Bank's commercial tellers, Annette Haskins, to apply the payment to the June and July payments on Audio Odyssey's

outstanding loan to Brenton Bank, an SBA guaranteed note. She accepted the payment which brought the loan payment current. At that same time Mr. Dincer personally informed Mr. Pieper, Vice President of the bank who was present at the time of the payment, that he was making these two payments. Mr. Pieper acknowledged to Mr. Dincer at that time that he understood, he made no protest, and he did not tell Mr. Dincer that, contrary to Mr. Dincer's instructions regarding the application of these payments, the bank would apply these amounts elsewhere. Nor did he inform Mr. Dincer that the Bank would sue him the next day (in violation of its SBA contract with Audio Odyssey, the Dincers and the SBA) in part based on a failure to make such payments.

Collateral for the loan also included an 85% guaranty from the SBA, a personal guaranty from the Dincers and second mortgages on two pieces of real estate, one of which was the Dincers' home.

The SBA loan had been made pursuant to a Loan Guaranty Agreement between the SBA and the Bank, which required prior written consent from the SBA to accelerate the maturity of any note and/or sue upon any loan instrument, as did 13 C.F.R. § 120.201-1 (1995). The Bank had not obtained this written permission.[3]

Audio Odyssey's insurance was in effect on July 14, 1995. Carol J. VanHoorebeck, a representative from Trissel, Graham and Toole, Audio Odyssey's insurance carrier, testified at her deposition on October 14, 1998:

> The only thing I could say is that as of July 14th, coverage was in force with a limit of $165,000.

The Bank states it had a Notice to Cancellation of insurance, but has never produced same. It does not exist.

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3. To its Petition in Replevin, the Bank had attached the Business Security Agreement and the Note. It did not include the Loan Guaranty Agreement (Deferred Participation); the Loan Authorization; the Guaranty on SBA Form 148 or the two mortgages signed by the Dincers on SBA Form 928.

Finally, Petitioners did act. The Dincers went to the courthouse to obtain a copy of the Petition in Replevin; they attempted to negotiate with the bank; they contacted the SBA; they hired an attorney who researched, wrote and filed a motion to dismiss. They did all of this with their business records seized. Iowa's replevin statute prohibited cross-claims, counterclaims and joinder of claims under sanctions. *Citizens State Bank* v. *Harden*, 439 N.W.2d 677 (Iowa App. 1989).

The irony of Respondents' implication that Petitioners were too slow in their response, is that if Respondents had been a little less hasty and reckless in their actions, they might not find themselves trying to defend their behavior in a § 1983 lawsuit. Respondents argue that certain material facts are in dispute, facts which Petitioners have demonstrated uncontrovertibly. Like much of these proceedings, this stands the law of summary judgment on its head in violation of *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322, (1986) and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 295 (1986).

II. The Supreme Court Should Grant Petitioners' *Writ For Certiorari* Because The Eighth Circuit's Decision Conflicts With Prior U.S. Supreme Court Decisions, Iowa Supreme Court Decisions And Iowa Law.

The compelling reason why the Supreme Court should exercise its *certiorari* jurisdiction over this case lies in the precedent-setting effect the Eighth Circuit's decision would have on future applications of the Iowa replevin statute. Respondents' assertion on page 9 of their Brief that "the court should decline to exercise its *certiorari* jurisdiction where petitioner has prevailed, the case has been remanded, and Petitioners have the opportunity to seek relief and damages" not only ignores the Fourteenth Amendment but also the ramifications of allowing the Eighth Circuit's decision to stand which now sanctions this type of extreme *ex parte* action without the Respondents being served an "Original Notice." This is contrary to Iowa's historical legal tradition of strict compliance with rules regarding "Original Notice." *See Suit Preclusion Through Noncompliance with Iowa Original Notice Requirements*, 55 Iowa L. Rev. 1049 (1970).

Respondents' footnote 4 suggests the Supreme Court does not have jurisdiction in this case. However,

> Congress has provided, in 28 U.S.C. § 1254(1), that the Supreme Court may review cases in the federal courts of appeal by '*writ of certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or degree.' The jurisdiction thus granted is plenary in nature. *See Forsyth* v. *Hammond*, 166 U.S. 506, 511-13 (1897). . . . As long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for *certiorari* is filed, the Supreme Court has jurisdiction to take the case whatever its status in the lower court. The *Conqueror*, 166 U.S. 110, 113-14 (1897).

(R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice 40-41 (6th Ed. 1986).)

In *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945), a case that was remanded by the appeal court for a new trial, the court found:

> The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case.

(*Id.*, 377.)

A. *It Is Appropriate For The Court To Review The Subject Of Personal Jurisdiction When Determining Whether A Statute Is Constitutional.*

In both *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346 (1981), and *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970), the issues Petitioners wanted to raise before the court were not directly related to the issues the court chose to address. In contrast, the determination of the constitutionality of the Iowa Replevin Statute has been one of the central themes before both the district and appeals courts.

B. ***Under The Iowa Rules Of Civil Procedure "Original Notice" Is Required Before The Court Obtains Personal Jurisdiction.***

Rule 1 of Iowa Rules of Civil Procedure states:

> These rules shall govern the practice and procedure in all courts of the state, except where they expressly provide otherwise, or statutes not affected hereby provide different procedure in particular courts or cases.

(Iowa Rules of Court State and Federal 1995.)[4]

Section 643.2 of the (Replevin) Code of Iowa (1995) states:

> The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim.

The Iowa Supreme Court has consistently held that the Rules of Civil Procedure concerning "Original Notice" must be strictly adhered to before the court obtains jurisdiction. In discussing Rule 50, the relevant portion being "The original notice shall be directed to the defendant, and signed by plaintiff or his attorney with the signer's address . . .," the Iowa Supreme Court said:

> It is too well settled for discussion that compliance with Rule 50 is required in order to obtain jurisdiction. Compliance with this rule is the only method by which a plaintiff may compel a defendant to submit to the court for a binding adjudication of their differences. Our previous holdings have firmly established that the provisions of Rule 50 are mandatory and that the rule has statutory status. (Citations omitted.)

(*White* v. *O'Neill*, 164 N.W.2d 79, 80 (Iowa 1969).)

Ten years later, the Iowa Supreme Court affirmed the district court's finding that there was no fatal defect in an original notice served in a foreclosure action but finding:

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4. *See* n.1, p. 1.

> A substantial defect renders an original notice fatally defective; any judgment based thereon is void.

(*Holmes* v. *Polk City Sav. Bank*, 278 N.W.2d 32, 34 (Iowa 1979).)

Finally, Respondents misconstrue the relationship in *Fisher* v. *Keller Industries, Inc.*, 485 N.W.2d 626 (Iowa 1992), to Petitioners' case. When Petitioners filed their motion to dismiss[5] on August 4, 1995, they contested the jurisdiction of the court. They certainly did not submit themselves retroactively to personal jurisdiction at the time of the seizure. It is the action the court took on July 14, 1995 that is central to the issue of personal jurisdiction in this case. On that date, when Judge Havercamp issued an order for the seizure of Audio Odyssey's personal property, the court had not obtained personal jurisdiction as required by the Iowa Rules of Civil Procedure 49 and 50.

The Eighth Circuit's decision found that "ordinary proceedings" incorporated the Iowa Rules of Civil Procedure, yet allowed that the court had discretion to order the seizure of personal property without following those rules, specifically Rule 49, Rule 50 and Rule 82(g) which required the service of "Original Notice" and proof of service to be filed with the clerk before action taken. This decision undermines the very foundations of Iowa's procedural due process structure.

C. *Iowa Code § 643.5 Does Not Allow The Court To Waive Notice.*

Iowa Code § 643.5 does not "except compliance" with the Iowa Rules of Civil Procedure as Respondents allege. It specifically states " . . . after notice. . . . " The law was changed in 1973 to comply with *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and *Thorpe Credit, Inc.* v. *Barr*, 200 N.W.2d 535 (Iowa 1972). All the discussion of subsequent cases, i.e., *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), is simply a red herring.

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5. The traditional special appearance to contest jurisdiction was abolished in Iowa and a contest to jurisdiction must be combined with any other basis for dismissal.

In Iowa when the law requires the court to take action in a civil case, it automatically invokes the procedural protections incorporated in the Iowa Rules of Civil Procedure. It is true that in *Interfirst Bank, Dallas, Texas* v. *Hanson*, 395 N.W.2d 857 (1986), the Iowa Supreme Court found the Iowa Replevin Law constitutional stating:

> As to statutory replevin, the United States Supreme Court in the landmark case of *Fuentes* v. *Shevin*, (citation omitted), struck down state statutes that allowed prejudgment replevin without notice **and** a right to contest prior to the seizure of the chattels, holding that such statutes worked a deprivation of property without procedural due process. We also determined that our previous replevin statutes were defective because of due process infirmities. *Thorpe Credit, Inc.* v. *Barr*, 200 N.W.2d 535, 537 (Iowa 1972). Our present prejudgment replevin section meets the requirements of due process. Iowa Code § 643.5 (1985).

(Emphasis added.) (*Id.* 860.)

In *Thorpe*, the Iowa Supreme Court found:

> We are bound under the holding in *Fuentes* to declare unconstitutional and invalid sections 643.5 and 643.6, The Code, for their want of notice **and** judicial hearing requirements prior to seizure.

(Emphasis added.) (*Thorpe*, 536, 537.)

Both *Thorpe* and the new statute predated *Mitchell* v. *Grant*. The Eighth Circuit's decision would have it that after the Iowa Supreme Court declared the replevin law unconstitutional because of its lack of required notice and judicial hearing before seizure, the Iowa Legislature changed the law so it still had no required notice and no judicial hearing before seizure of property. Then thirteen years later, the Iowa Supreme Court found the Iowa Replevin Statute constitutional because it had no required notice provision and no judicial hearing. The Eighth Circuit's decision disenfranchises Iowa citizens of rights ensured to them by their Legislature.

CONCLUSION

The Fourteenth Amendment argument rests not only on general notice requirements under due process, but also on the specific Iowa rules requiring "original notice" (49, 50 and 82g). The legislative scheme further features the Rule 215 dismissal leaving the replevin defendants adrift without a rudder or compass.

> Rules, especially those which fix jurisdictional matters, are not mere technicalities to be observed or ignored as the particular exigencies dictate. They are vital to the proper conduct of court business. . . . they have substance, in that they lay down definite rules which are essential in court proceedings so that those involved may know what may and may not be done, and confusion, even chaos, may be avoided. They are necessary; without them litigants would be adrift without rudder or compass. . . .

Gordon v. *Doden*, 154 N.W.2d 146, 148 (Iowa 1967).

WHEREFORE, Petitioners pray this court to allow their *Writ of Certiorari* and exercise its jurisdiction and reverse the upholding of summary judgment to these Respondents on the issue of the Fourteenth Amendment.

Respectfully submitted,

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